FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 963

CHARLES B. SOLOMON, AVERY TUCKER, MARTIN WESTON and JOSEPH B. MOHR,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Figures in parentheses followed by the letter "a" refer to pages of the Appellants' Appendix filed in the Appellate Court; [illegible] to pages of the record.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on April 4, 1960.

I.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals has not yet been reported officially. It is printed as Supplement A of this petition, at pp. 17-28.

II.

JURISDICTION

The Court of Appeals affirmed the judgment of the District Court against petitioners on April 4, 1960. On April 22, 1960, petition for rehearing was filed which was denied by order entered May 18, 1960. At the same time the Court of Appeals ordered a stay of mandate for 30 days to enable petitioners to file this petition for writ of certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

III.

QUESTIONS PRESENTED

On May 7, 1954, respondent filed its complaint against Charles B. Solomon, Avery Tucker, Martin Weston and Joseph B. Mohr (petitioners) and Max Solomon, Steve J. Marth, Charles Terry and Barry Steel Corporation (Barry). The complaint charged that in 1946 Tucker, Weston, Mohr and Terry, war veterans, had conspired with Max Solomon and Charles B. Solomon, non-veterans, to obtain from the War Assets Administration surplus steel in violation of the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. App. Appendix (1946 ed.) Section 1635, and that Marth, as an employee of War Assets Administration, had aided and abetted them in accomplishing their purpose (sic). The complaint also charged that Barry Steel Corporation was successors to Max Solomon and Charles B. Solomon [illegible]

A short statement of the nature of the case is essential to a [illegible] understanding of the questions presented.

received the benefits and profits from the sale of the stock involved (5a).

Summons was issued against all defendants except Mohr. It was not until July 19, 1957 that a special order was obtained for service on this defendant. While the suit was pending, Max Solomon, father of Charles B. Solomon, died and the case was dismissed as to him (53a). During this period, too, Barry Steel Corporation underwent reorganization and respondent's claim against it was disposed of in that proceeding. Accordingly, it was dismissed as a party defendant (53a).

Petitioners filed motion to dismiss in the District Court alleging that the complaint failed to state a cause of action, and that the action was barred by the Statute of Limitations and by previous suits instituted by the O.P.A. involving the same stock transactions. The motion was denied (5a). At the trial, Marth, the government employee, and Terry were dismissed at the close of the government's proof (56a). Following the charge of the Court to bring in separate verdicts, the jury returned (5a):

Against Tucker	$ 27,747.46
Against Mohr	51,903.92
Against Weston	62,572.68
Against Charles B. Solomon.....	142,224.06

Later on motion of respondent (59a) and over objection of petitioners (59a), the District Court changed the verdict and entered judgment as follows (57la):

Against Tucker and Solomon, jointly and severally	$27,747.46
Against Mohr and Solomon, jointly and severally	51,903.92

Against Weston and Solomon, jointly and severally ..... $25,572.[8]

By timely motion to vacate judgment and grant a new trial petitioners urged upon the District Court, among other things, that the case had been submitted at the request of government counsel, under the Management and Disposal of Government Property Act of 1949, 63 Stat. 387, 40 U.S.C.A., Sec. 489, instead of under the 1944 Surplus Property Act.

The Court of Appeals affirmed the judgment. Petitioners request for rehearing was denied. Their suggestion for a *en banc* hearing was not formally denied but petitioners were advised by letter from the Clerk of the Court of Appeals that the denial of rehearing included denial of *en banc* hearing because, apparently, of a standing rule of the court that rehearings should not be heard *en banc*. (See copy of letter printed as supplement B of this Petition, p. 29.)

From these facts and further facts to be mentioned, the following questions are presented:

1. Are Section 50 U.S.C.A. Appendix (1946 ed.) Section 1635(b)(2) (the 1944 Surplus Property Act) and 40 U.S.C.A. Section 489(b)(2) (the 1949 Management and Disposal of Government Property) so indistinguishable that charging the jury, at the government's request, under the 1949 rather than the 1944 Act did not prejudice the rights of petitioners?

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[8] 50 U.S.C.A. Appendix (1946 ed.) Section 1635(b)(2) is printed as supplement C of this petition, p. 30.

[9] 40 U.S.C.A. Section 489(b)(2) is printed as supplement D of this petition, p. 31.

2. Is an action for recovery of double the amount agreed to be paid under 50 U.S.C.A. Appendix (1946 ed.) Section 1635(b) (2) an action for the recovery of a penalty and therefore barred by 28 U.S.C.A. Section 2462?

3. Was the repeal of 50 U.S.C.A. Appendix (1946 ed.) Section 1635 (the 1944 Surplus Property Act) by 40 U.S.C.A. Section 502 (a) (the 1949 Management and Disposal of Government Property Act) a bar to the present action?

4. Was the government entitled to recover double the amount agreed to be paid, having already received the full purchase price, under 50 U.S.C.A. Appendix (1946 ed.) Section 1635 (b) (2), the 1944 Surplus Property Act?

5. Did the prior O.P.A. cases instituted by the government involving the same parties and the same transactions constitute an election and a bar to the present action?

6. Was it the government's duty to prove that not less than "50% of the invested capital or net income is owned by or accrues to" the non-veteran defendants to show a violation of the applicable revised certification (R0 22, 11-15-45) which replaced the earlier certification (R0 22, 10-15-45) requiring that a non-veteran must [illegible] less than a 50% "proprietary interest in the enterprise"?

7. Was the District Court's amendment of the verdict from a separate verdict to a joint and several verdict, and entry of a joint and several judgment thereon, a denial of petitioners' constitutional right to trial by jury under United States Constitution Amendment Seven?

8. Was the Court of Appeal's rejection of petitioners' motion for *en banc* hearing as set forth in Supplement B, in compliance with the rule of *West v. C. P. R. Co.*, [illegible] *P. R. Co.*, 345 U.S. 247.

[illegible] Government's Exhibit 2 A, [illegible] R0 22, [illegible] printed as Supplement E of the petition [illegible]

IV.

STATUTES AND REGULATIONS

1. The Statute on which the complaint was filed is 50 U.S.C.A. Appendix (1946 ed.), Section 1635(b)(2), 1944 Surplus Property Act, Supplement C, p. 30.

2. The statute which the District Court read and charged to the jury is 40 USCA Section 489(b)(2) the 1949 Management and Disposal of Government Property Act, Supplement D, p. 31.

3. Section 502 of the 1949 act repealing the section of the earlier 1944 Surplus Property Act on which the complaint was based, so far as here material, reads:

> "There are hereby repealed (1) The Surplus Property Act of 1944, as amended (except Sections 13(d), 13(g), 13(h), 25 and 32(b)(2), and Sections 501 and 502 of Reorganization Plan numbered 1 of 1947 * * *."

4. The certification (RO 22, 11-15-45) under the revised regulations (SPA Reg. 7, dated October 16, 1945, 6[illegible]) pursuant to which the steel purchases were here made, set forth, so far as here material in Supplement E.

V.

CONCISE STATEMENT OF THE CASE

The facts are sufficiently set forth under "Questions Presented" with the following additions. The veterans involved are wrongdoing, insisting that they had acted as government operators, and had received the full share of the profit on their sales (12 a, 350a, 476a). In fact, O.P.A. thought they had received too much, and filed suits against them for the overpayments. These were settled

and compromised. Weston paid O.P.A. about $350.00 (459a). Tucker settled his claim, which was for $292.91, with O.P.A. (513a). The total profit received by the veterans was less than $3,000.00 (475a, 271a, 415a). Yet they are saddled with a liability of over $142,500.00.

VI.

REASONS FOR GRANTING THE WRIT

A. In 1949 Congress passed a general Management and Disposal of Government Property Act, 63 Stat. 378, 40 U.S.C.A. Section 471, *et seq.* Its purpose was to eliminate the narrow, inefficient administration of surplus property under the 1944 Act and to establish in its place a comprehensive governmental procedure for dealing with surplus and excess property generally, not merely war generated surplus. Accordingly, the earlier act was for the most part repealed including that section which provided for recovery by the government. Bearing out the *Congressional intent*, the preface of the new act contains reference to Acts under *this Chapter*.

The nature and extent of the government's rights under the 1944 act, 50 U.S.C.A. Appendix (1946 ed) section 1635 (b), and under the 1949 act, 40 U.S.C.A. Section 484(b), and the effect upon liabilities incurred under the former act sought to be enforced after its repeal have raised grave questions. So far as we have been able to discover the issues here raised by petitioners, except that of the statute of limitations, have not been the subject of reported cases. Because of the widespread application of these statutes to many cases which are no doubt now pending and will be pending in the federal courts, this court should now definitely and resolve the respective rights of the various parties.

1. Can a charge under the 1949 Act sustain a judgment for acts committed under the 1944 Act? The 1949 Act broadened the scope of liability to include conspiracies in connection with the procurement, transfer or disposition of government property (Supplement D, p. 314), while the 1944 Act was limited to conspiracies in connection with disposition only (Supplement C, p. 30f). The additional words must have added additional obligations. *Illinois Central R.R. Co.*, 99 U.S. 38. It is impossible to say that the jury may not have found petitioners guilty of conspiracy in connection with procurement or transfer. The possibility that they might have arrived at a different conclusion had they been charged only as to disposition cannot be overlooked. Every doubt should be resolved in favor of petitioners to insure a fair trial on the issues of the case.

Whether petitioners failed to call this to the attention of the trial judge at the moment, is, in case of such fundamental error of no consequence: *Mondello v. Shaw* (C.C.A. 5) 198 F. (2d) 666; *Trumpler v. Chicago D. & Trust Co.* (C.C.A. 2) 244 F. (2d) 253; *Sandlin v. Electric Corporation* (C.C.A. 4) 172 F. (2d) 548; *particularly in view of the fact that the 1949 Act was in parts read upon the trial* [illegible] (C.A.Br.).

2. The Court of Appeals disposed of petitioners' contention that the present action was for a penalty and not for liquidated damages on the authority of *Bull v. United States*, 279 U.S. 115, and *Kelly v. United States*, 279 U.S. 300. It rejected their claim that the cases were brought under subsection (b)(1) for $2,000 damages for each transaction, while the present action was under subsection (b)(2). As pointed out in *Bull v. United States* there could be a reasonable relation between actual damages difficult of proof and $2,000.00 as liquidated damages.

Mr. Justice Douglas and Mr. Justice Stewart, Dissenting, and Mr. Justice Black and Mr. Justice Reed.

what conceivable relation can there be between the price paid and double that amount again, $11,222,196, as liquidated damages. It is inconceivable that, without any proof of actual damage, such a tremendous sum can anywhere even approximate any damage respondent may have suffered. We further stress that this record is barren of any claim or proof that the price paid for the surplus property obtained, was not the fair value fixed and received by the Disposal Agency for the Government. To impose the measure of damages as urged unquestionably violates every expressed theory of liquidated damages.

In *Gamble v. United States*, (C. Cl.) 152 F. Supp. 78, the Court considered Rex Tractor in which Keller was decided and held that the addition of 25% of the amount fraudulently claimed was a penalty. It said (84):

> "This Court in *Erie Basin Metal Products v. United States*, Ct. Cl. 150 F. Supp. 561, had occasion to determine the applicability of 28 U. S. C. Section 2462 to counter-claims pursuant to section 19 of the Contract Settlement Act. In Erie Basin the Court rejected the Government's contention that recoveries under Section 19 were in the nature of liquidated damages and held they were civil penalties subject to the limitation imposed by 28 U. S. C. Sec. 2462."

Stated or cited by the dissent in Keller:

> *United States v. Int. Mercantile Marine*, 317 U. S. 567;
>
> *Pritchard Sons v. United States*, 302 U. S. 407.

It is to be noted that as to petitioner Moler no summons was issued until 1957 (see calendar entries) at which time respondent obtained a special order for service upon him. This was more than 10 years after the event. Merely filing

suit without good faith effort to serve process does not toll the Statute of Limitations. *Lau and Lau, Trustee v. United States*, 251 U. S. 574; *Gibson v. Hughes* (1943, D. C. Mich.) 4 F.R.D. 119.

3. The Court of Appeals interpreted Section 22 (b) to allow recovery of twice the amount paid for the goods in addition to the original price paid. We think this ignores the intent of Congress. Sections (b)(1) and (b)(2) clearly apply to executed contracts. Section (b)(3) notes and by its very wording, does apply to executory contracts, i.e. where the purchase price has not yet been paid but agreed to be given. Only by this construction can the various alternative remedies be consistent.

The present holding of the Court of Appeals enables the government, *without any proof of damages*, whatsoever, arbitrarily to exact a 200% gain.

4. It is conceded that under the revised regulation (SPA Reg. 7, dated October 19, 1945) the petitioner veterans had the right to resell the goods purchased on priority. Under the earlier certification form (RO 22, 11-15-45) a non veteran had no right to participate with them unless such non veteran had a "Proprietary interest in enterprise" which did not exceed 50% of the invested capital or gross income. However, under the revised certification (RO 22, 11-15-45) (Supplement E, p. 22) by which all of the petitioner-veterans purchased the proprietary interest was eliminated. A non veteran could now participate as long as less than "50% of the invested capital or net income is owned or controlled by such non veteran."

It is evident, then, that while under the former certification the non veteran's participation in the veteran's enterprise had to be a "proprietary interest", albeit less than 50%, under the latter certification (applicable here) he did not have to have a proprietary interest. He could

for example, with proprietary merely advance funds and cooperate with him so long as he received less than 50% of the net profit.

It was respondent's burden, then, in order to bring petitioners under the prohibition of the law to prove that such non-veteran had 50% or more of the invested capital, or was receiving 50% or more of the net profit. There was no evidence of either.

We think this was an extremely vital point which the Court of Appeals completely ignored.

B. The decision of the Court of Appeals is, we believe, in conflict, at least in principle, with decisions of this court and other federal courts.

1. The Court of Appeals overcame petitioner's contention that the 1944 Act had been repealed by relying upon the general saving statute, 1 U.S.C.A. Section 109. But this court said in *Great Northern R. Co. v. United States*, 315 U.S. 262, 265:

> "As the section of Revised Statutes in question has only the force of a statute, its provisions cannot override a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment."

See *Alaska v. American Can Company*, D.C. Alaska 137 F. Supp. 181;

Wilmington Trust Co. v. United States, D.C. Del. 128 F. (2d) 208.

Here we have in the 1949 Act an express repeal of the section relied upon by respondent with a savings clause as to certain other sections of the 1944 Act. It is an established rule of statutory construction that an exception from the repeal is legislative expression of intent to save only those

sections and non-veteran. *Shelton v. [illegible] Co. [illegible] pany, supra*, [illegible] Wash. 2d 73 (Mich. 178).

2. In 1947, respondent through its O.P.A. filed suit in the same District Court against petitioner Weston [illegible] charging him as "engaged in the business of buying and selling" steel and having overcharged $[illegible] [illegible]. The case was settled by Weston by payment of about $[illegible] [illegible]. About the same time a similar action was instituted against petitioner Tucker who also settled his claim [illegible]. Both cases involved the identical steel transactions now involved and claimed overcharges on their sales to Barry Steel. Yet now the respondent inconsistently says that Weston and Tucker were not in the steel business, did not make sales to Barry, but were merely the agents. Petitioners claim based upon *United States v. Ocean Leader Co.*, 200 U. S. 290 and *United States v. Lefkowitz*, 282 U. S. 368, that respondent had made irrevocable election and waiver by the earlier settlements. *United States v. Chicago*, 102 U. S. 667, [illegible] by the Court of Appeals.

The reason given was that the respondent did not knowingly make an election. As the record bears, it is that respondent's investigator made his investigation [illegible] August [illegible] of the Steel cases, elevated his report to his [illegible] and sent it to the central office in Washington [illegible]. At that time he was investigating the [illegible] made by the various parties [illegible]. The O.P.A. was [illegible] in 1947.

The Court of Appeals overlooked the applicable principles of law in applying the non-waiver rule [illegible].

3. While the District Court reasonably charged the jury concerning the liability of the petitioners as corporations yet he specifically directed them to bring in separate verdicts as to the three defendant veterans and the defendant non-veteran [illegible]. On the jury's request for [illegible] instructions he again emphasized that they must be

[illegible] verdicts as to each of the four [illegible] Complying with the specific direction of the judge, the jury returned:

Against Tucker	$ [illegible]
Against Moler	[illegible]
Against Weston	[illegible]
Against Charles B. Solomon	[illegible]
Total	$[illegible]

On petitioner's objections to the verdicts and proposed form of separate judgments, government counsel conceded that it was not entitled to judgment in that amount, that his original prayer was for around $[illegible] with Terry [illegible] and with him out the amount would [illegible] [illegible] He further stated [illegible]:

> "Now, when we get through to the judgment and the verdicts, it is my theory that we could not, according to my understanding of it, get a judgment greater than the amount we asked for."

Having thus controlled verdicts concededly excessive by [illegible] the trial court should have set aside the verdicts or [illegible] a remittitur accordingly, which would [illegible] [illegible] as follows:

Against Tucker	$[illegible]
Against Moler	[illegible]
Against Weston	[illegible]
Against Charles B. Solomon	71,112.04

[illegible] was originally [illegible]. The claim [illegible] was [illegible] [illegible]. According [illegible] was [illegible] [illegible].

But instead of this the trial judge and government counsel changed the separate verdicts of the jury into joint and several verdicts thus:

Against Tucker and Solomon, jointly and severally	$27,7[illegible]
Against Mehr and Solomon, jointly and severally	51,90[illegible]
Against Weston and Solomon, jointly and severally	62,572.[illegible]

The Court of Appeals brushed aside petitioner's contention that this was prejudicial error by reliance upon Rule 61, Rules of Civil Procedure. That there was no harm done. But the court has overlooked the fact that each petitioner, under a properly remitted verdict would have been liable for but one-half of the amount in which he now stands charged.

We think, too, that the trial judge by the totally inconsistent amendment, has effectively deprived these petitioners of the right to have their liability determined by the jury. United States Constitution, Amendments Seventh. Rule 61 has never been considered a cure all and is not intended to deprive a litigant of his substantial rights. *Aronson v. Great American Indemnity Co.* (C.C.A. 5) 146 F. (2d) 797.

While it is true that in some instances judges may correct the jury's verdict in matters of form or to conform to the jury's intent as properly expressed, 53 A. L. R. 220-221, it has never been held that the judge has the right to substitute his verdict for the jury's. Here the jury's intent was to bring in separate verdicts, as it did because it was specifically instructed to do so. 552a, 556a

It did not intend to do otherwise, i.e. bring in joint and several verdicts.

> "The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. After the amendment the verdict must be not what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing that must be expressed and worked out by the amendment." 56 A.L.R. 24 220-221.

Here the jury, complying with the court's repeated erroneous instructions (556a, 552a), intentionally brought in separate verdicts totalling four times the amount already paid without any proof whatsoever of actual damage. The judge compounded the error by overriding the jury's intention and substituted his own verdict by the joint and several modification.

We thus have the anomaly of the case being submitted to the jury at the insistence of government counsel and instructions of the trial judge on the theory of separate verdicts and a return by the jury of separate verdicts in an amount in excess of even the government's claim. Then in a desperate effort to save such a dubious verdict we now find government counsel inconsistently urging upon the court that the verdict should now be joint and several instead of separate, an urging accepted by the trial judge (556a).

To fully establish invasion of the jury's function we find the Court, after directing the jury to return separate

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"Mr. Welsh: I entered this, that the separate judgments is lawful. It is lawful. I can protect it on appeal. But I was asking for less judgment is what I was saying" (556a).

verdicts (552a) consenting to a change in such verdicts but stubbornly clinging to his considered theory of liability and damages, and we quote "although I do feel, under strict interpretation of the language of the statute, that judgments could very well be entered upon the verdict as returned by the jury, in the amounts I have mentioned, against the veteran defendants, plus a further amount equal to the sum of those three figures against the defendant Solomon. In any event, I will enter the judgments accordingly" (568a).

Cf. *Ohio Valley Bank v. Greenebaum Sons Bank & T. Co.* (C.C.A. 4) 11 F. (2d) 87.

C. Petitioner's suggestion to the court of appeals that their petition for rehearing *en banc* was disposed of as noted in letter to counsel from the clerk, copy of which is attached as supplement B. We do not feel that the consideration thus given petitioner's request was in compliance with *Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247.

CONCLUSIONS

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

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SUPPLEMENT A

No. 13,953

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

CHARLES B. SOLOMON, AVERY TUCKER, MARTIN WESTON and JOSEPH B. MOHR, *Appellants*, v. UNITED STATES OF AMERICA, *Appellee*.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided April 4, 1960.

Before: Simons, Senior Circuit Judge, Miller and Cecil, Circuit Judges.

Miller, Circuit Judge. The appellee, United States of America, filed this action in the District Court against Max Solomon, his son Charles B. Solomon, Steve J. Marth, Avery Tucker, Martin Weston, Joseph B. Mohr, Charles Terry, and Barry Steel Corporation. The complaint alleged that in 1946 Tucker, Wesley, Mohr and Terry, who were war veterans, conspired with Max Solomon and Charles B. Solomon, who were non veterans, to obtain from the War Assets Administration surplus steel in violation of the Surplus Property Act of 1944, 58 *Stat.* 765, 50 *U. S. C. App. Appendix, 1946 Edition, Sections 1611 through 1646.* It was also alleged that Marth, as an employee of the War Assets Administration, had aided and abetted them in accom-

plishing their purpose, and that Barry Steel Corporation received the benefits and the profits from the sale of the steel involved. While the action was pending Max Salmon died and the Barry Steel Corporation underwent a reorganization and the Government's claim against them was dismissed. At the close of the Government's evidence the District Judge directed verdicts in favor of the defendants Terry and March. At the conclusion of the trial the jury returned verdicts against the remaining four defendants, upon which verdicts judgments were rendered, followed by this appeal.

Section 26 (b) of the Surplus Property Act of 1944, Section 1635 (b), Title 50, App., U. S. Code, 1944 Edition, provides as follows:

> "(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefit from the United States or any Government agency in connection with the disposition of property under this Act (such sections); or who enters into an agreement, combination, or conspiracy to do any of the foregoing

> "(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

> "(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given to such person to the United States or any Government agency; or

> "(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property."

In the present case the Government elected to claim damages under Section 26 (b) (2).

The following brief review of the Government's evidence is sufficient to show the facts upon which the Government relies and to present the issues involved on this appeal. Appellants Tucker, Mohr and Weston were honorably discharged veterans who qualified for a priority status under the Disposal Program. Max Solomon and Charles Solomon, who were non-veterans, were in the business of purchasing steel under the partnership name of Barry Products, which partnership was later incorporated under the name of Barry Steel Products, Inc. They were not entitled to a priority status. Each of these veterans made written application to the War Assets Administration for the purchase of steel under their priority status. The applications were typed in the office of Max and Charles Solomon by the secretary for the Solomons. The information for these applications were furnished by the Solomons. The Solomons paid to each veteran the amount of money which the veteran had agreed to pay for the steel. Each veteran, after receiving this money from the Solomons, paid for the steel by his own check. The Solomons received no note or security for the payment of this money to the veterans. The price paid for the purchase of steel under these applications was.

Tucker	$13,873.73
Weston	31,286.31
Mohr	25,951.96

Neither of the veterans was in the steel business, nor did any veteran have any warehouse facilities. The applications contained false statements with respect to the steel business in which each applicant stated he was engaged. At least in the cases of Tucker and Weston, the veterans did not see or inspect the steel so purchased. The veterans had nothing to do with the shipping instructions and the steel so purchased was shipped direct to the Solomons according to Solomon's instructions. The veterans did

for engage in the steel business after making the purchase involved in this action.

It is admitted by the Government that the veterans were legally entitled to a priority status in the purchase of the steel in question and after purchasing it had a right to resell it instead of using it. It is contended, however, that the purchases in the present case were not purchases by the veterans, but actually were purchases by the Solomons through fraudulent use of the priority rights of the veterans.

Evidence was introduced on behalf of the appellants that the purchases by them were bona fide transactions, that the steel so purchased was resold by them to the Solomons before they paid for it, and that the money transferred to them by the Solomons before they paid for their purchases were advance payments by the Solomons to the veterans on account of the resale of the steel and not payments by the Solomons to the Government.

The question presented by the evidence was whether the veteran involved in each transaction under consideration conspired with the Solomons to engage in a fraudulent scheme or device for the purpose of enabling the Solomons to obtain surplus steel from the Government on a priority basis, which is a violation of law under the Surplus Property Act thereby benefiting non-veterans, who not entitled to such a priority basis.

Appellants' first contention is that the evidence was insufficient to take the case to the jury on this issue and that the court erred in not sustaining the motions for directed verdicts in favor of each of the defendants, instead of only in favor of only Perry and Martin.

Although the Government's evidence was contradicted by some witnesses, it is well settled that upon a motion of a defendant for a directed verdict, the trial judge should overrule the motion unless, viewing the evidence in the light most favorable to the plaintiff, there would be no substantial evidence to support a jury verdict if returned for him. *Hinton v. Bess Oil Exp. Co.*, 188 F. (2) 121, 123.

6th; *Scott v. United States*, 161 F. (2) 1009, 1012, C. A. 6th.

Applying the rule to the evidence in the present case, we are of the opinion the District Judge properly overruled appellant's motions for directed verdicts.

Various other questions have also been raised by the appellants, which will be considered in turn.

The complaint, which was filed May 7, 1954, alleges that the appellants committed the acts complained of in March and April, 1946. Appellants contend that the action was barred by Section 2462, Title 28, U. S. Code, which provides that an action "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary, or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." The action was not brought until more than eight years after the alleged cause of action accrued. In *United States v. Wittemann*, 211 F. (2) 858, C. A. 6th, this Court held that an action under Section 26 (b) (1) of the Surplus Property Act of 1944 was an action for penalties to which Section 2462, Title 28, U. S. Code, was applicable. However, the Supreme Court in *Rex Trailer Co. v. United States*, 350 U. S. 148, later held that such an action was a civil remedy in the nature of liquidated damages and was not a criminal penalty. Based upon this ruling, the Court of Appeals for the Third Circuit and the Supreme Court held in *United States v. Brown*, 255 F. (2) 865, C. A. 3rd, affirmed *sub nom. Keller v. United States*, 359 U. S. 309, that a suit for damages under Section 26 (b) (1) of the Surplus Property Act of 1944 was not a suit to enforce a fine or penalty and therefore was not subject to the five year limitation of Section 2462, Title 28, U. S. Code. See also: *United States v. Hoover*, 207 F. (2d) 706, 708, C. A. 5th.

Appellants attempt to avoid the effect of this ruling by pointing out that the ruling involved an action brought under Section 26 (b) (1) of the Act and is not applicable to our present action which was brought under Section 26 (b) (2) of the Act. They contend that the reasoning

of this Court's opinion in [illegible] v. [illegible], [illegible] 211 F. 121 [illegible] C. A. 6th, is very much in point [illegible] this Court is now called upon to construe Section 26 (b) [illegible] of the Act, which is materially different from Section 26 (b) (1) and which has not yet been construed by a reported federal case. We find no merit in the claimed distinction between the two sections. In *Re: Trustees of United States v. [illegible]*, 330 U. S. 148, at pages 151-152, the Supreme Court said with respect to the three alternative remedies provided by Section 26 (b), subsections 1, 2 and 3: "All three were recognized as civil remedies by Congress before the bill was passed, and the conclusion is inescapable that each was of the same nature and designed to serve the same purpose."

The Surplus Property Act of 1944 was for the most part repealed by the Federal Property and Administrative Services Act of 1949. *Sections 601-611, Title 40, U. S. Code.* Section 26 of the 1944 Act, under which the present action was brought in 1954, was one of the sections so repealed. Including so, the 1949 Act substantially reenacted with a change in wording, the civil remedies previously provided by Section 26 of the 1944 Act. *Section 106, Title 40, U. S. Code.* We are not by appellants' contention that the rights and remedies provided by Section 26 of the 1944 Act were cancelled and extinguished by the repealing Act of 1949, which was enacted prior to the filing of the present action. This contention fails to consider the general savings statute, now carried as Section 109, Title 1, U. S. Code. Under the provisions of that section, Section 26 of the 1944 Act is treated as remaining in force for the purpose of sustaining a proper action for the enforcement of any liability thereunder. *In re: Estate of [illegible], United States v. [illegible]*, [illegible] U. S. [illegible]; *[illegible] v. [illegible] Co.*, 347 U. S. [illegible]; *[illegible] v. [illegible]*, 107 F. Supp. [illegible] (S. D. N. Y. [illegible]), reversed on other grounds, 207 F. [illegible] (C. A. 5th).

One of the defendants named in this action was Stanley Morris, who during 1945 and 1946 was employed by the Reconstruction Finance Corporation and the War A[illegible]

[illegible] instructions. At the close of the government's case the District Judge sustained a motion for a directed verdict in favor of the defendant and he was discharged from the case. Appellants contend that under the 1944 Act the conspiracy must relate to the "disposition" of government property; that under the 1939 Act the conspiracy could relate to the "procurement, transfer, or disposition" of government property; that giving effect to the broader [illegible] of the 1944 Act, the word "disposition" under the 1944 Act should be construed as being restricted to the relinquishment of title or possession by the one who owns or possesses it; that giving such a construction to the word "disposition" in the 1944 act makes it necessary that a government agent be involved in the alleged conspiracy; and that upon the dismissal from the case of the government agent March there was no conspiracy on the part of the other defendants as required by the 1944 Act.

This point was not raised by counsel for appellants during the trial, due to the fact that in instructing the jury the District Judge inadvertently used the wording of the 1939 Act, which inadvertence was apparently also included in the brief of counsel for the appellants. Under the instructions, the point would not have been well taken. No exception was taken to that portion of the instruction, and accordingly it is not subject to review at this time. [illegible] *Pennsylvania R. R. Co. v. Chicago, R. I. & P. R. R. Co.*, [illegible]. The point was first raised in appellants' motion for a new trial, after it was discovered that the instruction had been based upon the 1939 Act, instead of upon the 1944 Act. Obviously, if under the 1944 Act, there existed no cause of action against the appellants, following the dismissal from the case of the government agent, the point was properly raised [illegible] motion for a new trial and well taken. [illegible] *Ex parte Jackson*, [illegible] U. S. [illegible], 181, [illegible]; *[illegible] v. [illegible]*, 122 F. (2d) 765, 768, 6 Cir. [illegible]; *[illegible] v. [illegible]*, 251 F. (2d) [illegible], 2 Cir. [illegible].

We are of the opinion that appellants' argument misconstrues the nature of the action. The Statute is directed at a conspiracy "for the purpose of securing of obtaining * * * for any person any * * * property, or other benefits from the United States or any Government agency, *in connection with* the disposition of property under the Act". (Emphasis added.) The illegal conspiracy was not one to dispose of government property. It was a conspiracy to *obtain* government property *in connection with* its disposition by the Government under the Act. The Government was disposing of its surplus personal property, notwithstanding the fact that one of its employees was not engaged in the conspiracy. The complaint charged each of three veteran appellants with conspiring with appellant Charles Solomon to acquire certain surplus government property which was being sold by the War Assets Administration, a governmental agency, at Detroit, Michigan, between March 4 and May 30, 1946, inclusive. We find nothing in the statute which requires the conspiracy to be with a government agent or employee. The District Judge properly overruled the motion for a new trial based on this question of law.

This action sought damages under option 2 of Section 26 (b) of the 1944 Act, which provides that "Every person who * * * enters into an agreement, combination or conspiracy * * * to engage in any fraudulent trick or device for the purpose of obtaining * * * property from any Government agency in connection with the disposition of property under the Act, shall pay to the United States as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency." Appellants contend that in the case of each veteran, judgment could not go against both the veteran and Solomon because *first* the veteran was the "person" who agreed to give the consideration to Solomon, the "person", but both the veteran and Solomon were "such person" as defined in the Act. This argument assumes that a conspiracy may not be a tort and that participators in it legally are not joint doers. Mr.

v. *Fairbank*, 296 U. S. 140, 165; *Standard Oil Co. of California* v. *Marysville*, 251 F. (2) 188, 211, C. A. 9th, cert. denied, 356 U. S. 975. Appellants' further contention that since the consideration has been paid the amount so paid should be credited against the liquidated damages of "twice the consideration agreed to be given" finds no support in the language of the statute, and is accordingly rejected.

In 1947 the Government through its Office of Price Administration filed complaints against appellants Weston and Tucker claiming overcharges in the sale of steel by them to Barry Steel Products. This was the same steel involved in the present action. The claims were settled by payments of small amounts by Weston and Tucker. Appellants claim that these O. P. A. suits were based on the contention that Weston and Tucker were the owners of the steel and that Barry Steel Products had purchased it from them, which position is inconsistent with the Government's contention in the present case that the steel was not purchased or owned by these appellants, but was in fact purchased from the Government agency by the Subpoenees. Appellants contend that the filing and prosecution of the O. P. A. cases constituted an election by the Government which is binding upon it and bars the prosecution of the present action arising out of the same facts. Election of remedies is a well recognized principle of law, but, in order to be applicable, certain facts must exist, one of which is that there must be a choice, knowingly made, between two inconsistent rights, either of which may be asserted at the will of the chooser. If, through a mistake of material fact or of law, alternative remedies are not known to be available, the election of what later develops to be an improper remedy does not constitute an election which will bar the party from later asserting the proper remedy which is open to him. *Gray* v. *United States*, 227 F. (2) 121, 124, C. A. 5th; *Hook* v. *Connecticut Casualty Ins. Co.*, 163 F. (2) 399, 403, C. A. 10th; *Sun Life Ins. Co.* v. *Horn*, 297 U. S. 339, 346-347; *Crocker Corp.* v. *United States*, 229 F. (2) 376, 378-379, C. A. 9th; *Bennett* v. *United States*, 236 F. (2) 697, 700-701, C. A. 10th. The filing of the O. P. A. suits under the circumstances then

existing did not constitute an election of remedies by the Government which would bar its later prosecution of the present action.

The jury, under instructions by the Court, found separate verdicts against each of the four appellants as follows: Tucker $27,747.46; Moore $51,905.92; Weston $62,372.08; Solomon $114,224.06. These amounts were the case of each veteran plus the amount of the commission passing from the purchaser to the government. Thereafter, the Court entered judgments as follows: $27,747.46 jointly and severally against Tucker and Solomon; $51,905.92 jointly and severally against Moore and Solomon; and $62,372.08 jointly and severally against Weston and Solomon.

Appellants contend that the Court erred in instructing the jury to return separate verdicts, in that conspirators, liable, are liable jointly and severally, by their separate. They also contend that after separate verdicts were returned, the Court was without authority to enter several judgments and that such action was a substantial alteration of the jury's verdict. We find no error in these contentions.

It is well settled that the liability of conspirators is joint and several liability. *Lawlor v. Loewe*, 187 F. 415, 416, 6th C. A. 1911; *International Paper Co. v. U. S.*, 120 F. 1, 127, 6th C. A. 1903, affirmed, 194 U. S. 545; *Cooper v. Cooper, Tilghman Co.*, 157 F. 8, 9, 6th C. A. 1907. But the separate verdicts were not inconsistent with a principle of law. Under Rule 49(a), Rules of Civil Procedure, the trial judge is authorized to submit to the special findings of fact which may be made by him under the pleadings and evidence, together with such explanation and instructions concerning the matter as may be necessary to enable the jury to make its findings on such issues. The separate verdicts in this case are special factual findings. They do not constitute the law of the case. The trial judge has the responsibility of apply-

[illegible]

that liability on the part of the appellant Solomon did not exist in the absence of liability on the part of the partner Vertan appellant with whom it was charged he conspired, and that the question of damages with respect to the liability of each appellant was correctly presented. Other objections were not made to the Court's charge at the time it was given and our review is accordingly so limited by *Rule 51, Rules of Civil Procedure*.

The judgments are affirmed.

SUPPLEMENT B

Office of the Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Cincinnati 2, Ohio

Carl W. Reuss
Clerk

May 29, 1959

Mr. George Stone
2500 Guardian Building
Detroit 26, Michigan

Re: Charles B. Solomon, et al. v. United States of America—No. 13,953

Dear Mr. Stone:

Copies of your recent letter were distributed to the Court and I am directed to advise you that the denial of the petition for rehearing in this case included a denial of a rehearing en banc.

I am further directed to call your attention to the rule heretofore laid down by this Court that in cases where the appeal was heard and the judgment or order complained of was decided by a regular court consisting of three judges, a petition to rehear should not be considered by the court en banc. *National Labor Relations Board v. Cambria Clay Products Co.*, 229 F. (2) 433, C. A. 6th; *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 229 F. (2) 434, C. A. 6th; *Michigan Consolidated Gas Co. v. Parkwell Natural Gas Co.*, 226 F. (2) 60, 72 C. A. 6th; *National Bank of Detroit v. Wayne County National Bank*, 252 F. (2) 537, 544, C. A. 6th.

Yours very truly,

Carl W. Reuss
Carl W. Reuss, Clerk

CWRmmd

SUPPLEMENT C

SURPLUS PROPERTY ACT OF 1944. 58 STAT. 765. 50 U. S. C. A. APPENDIX (1946 Ed.) SEC. 1635(b)

(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

SUPPLEMENT D

MANAGEMENT AND DISPOSAL OF GOVERNMENT PROPERTY ACT OF 1949, 40 U. S. C. A., SEC. 489(b)

(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent, trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain for any person any payment, property, or other benefits from the United States or any federal agency in connection with the procurement, transfer, or disposition of property under this chapter, chapter 11B of Title 5, chapter 4 of Title 41, and chapter 11 of Title 44—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damages which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States, the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

SUPPLEMENT E

Excerpt from Plf's. Ex. 2-A, page 635a

RO-22
Revised
11-15-45

SMALLER WAR PLANTS CORPORATION
REGIONAL OFFICE—711 BOULEVARD BUILDING
DETROIT 2, MICHIGAN

REVISED CERTIFICATION BY VETERAN APPLICANTS TO BE ATTACHED TO ALL FORM 66 APPLICATIONS

(NOTE:—These are to be used until the new Form 66 is received. The certification on the back of the present Form 66 is not to be used.)

I hereby certify (1) that all of the foregoing statements are true to the best of my knowledge and belief; (2) that I served in the active military or naval services of the United States on, or after, September 16, 1940, and prior to the termination of World War II, and was discharged or released therefrom under honorable conditions; (3) that the enterprise described herein is one of which more than fifty (50) percent of the invested capital or net income thereof is owned by, or accrues to me, or other veterans, and that less than 50% of the invested capital or net income is owned by or accrues to non veterans or that the property described herein is required as a condition of my employment by others; (4) I hereby certify that the surplus property herein applied for is to be used in and as part of the enterprise described herein; (5) I also certify that the surplus property for resale, if any, if applied for, is initial stock, necessary, within reasonable limits, for

enterprise; (6) I further certify that I have not heretofore applied for or received any surplus property, under the veterans' preference except at the following Smaller War Plants Corporation's offices:

.....

.....

Moler Steel Co.
s/ Joseph B. Moler
(Signature of applicant)

Date 3-27-46